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October 29, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in WT Docket No. 99-217

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding.

On October 28, 1999, the following representatives of the Real Access Alliance met with Jeffrey Steinberg and Zenji Nakazawa of the Wireless Telecommunications Bureau, and Eloise Gore and Cheryl Kornegay of the Cable Services Bureau:

Brent Bitz	Charles E. Smith Commercial Properties
Jeanne Delgado	National Association of Realtors;
Gerard Lavery Lederer	BOMA International;
Judith L. Harris	Reed, Smith, Shaw and McClay;
Stephen Rosenthal	Cooper, Carvin & Rosenthal; and
Matthew C. Ames	Miller & Van Eaton, P.L.L.C.;

The meeting addressed access to buildings by telecommunications providers. The attached written ex parte presentation was given to the Commission staff at the meeting. In addition, Mr. Bitz made the following points regarding the concerns and practices of building owners:

- Mr. Bitz offered several examples of buildings in which his company entered into agreements with telecommunications providers at the request of existing or prospective tenants. Building owners will make concessions not only to new tenants but also to existing tenants, even those under long-term leases, because the expense of replacing a tenant at the end of the term far exceeds any possible revenues from telecommunications providers. For example, construction allowances for new tenants are often in the range of $20 - $30 per square foot, without even considering lost rent during any vacancy period, while telecommunications revenues average $0.12 per square foot. Construction allowances for existing tenants are often around $5 per square foot. Consequently, a competent property owner or manager should never lose a tenant because of a disagreement over access by a service provider. Building owners save money if satisfied tenants decide to stay in a building, and telecommunications revenues do not even come close to affecting that calculation. This is true today, in a very good real estate market, and is even more true in a poor market, when lease negotiations often center on the value of tenant inducements offered to offset rental rates that may be higher than the market rate because of the owner's financial obligations.

- For the same reason, a building owner has no incentive to select a telecommunications provider merely because the provider offers to pay more for access than another. Even an offer of five times the going rate cannot compensate for the potential cost of one disgruntled tenant.

- Building owners anticipate that there will typically be no more than 3-5 facilities-based providers serving any particular building simply because it would not be cost effective for additional providers to make the investment needed to compete once the initial group of providers have entered into contracts with tenants. In addition, building owners are keenly aware that tenants are likely to hold them responsible for any problems the tenants have that are in any way related to the tenants' occupancy of the building. Furthermore, although the typical access agreement takes the form of a license, at the insistence of providers they are generally for a five-year term and are not revocable by the building owner for failure to provide good service. All this means that building owners must examine potential providers very carefully. The three principal criteria building owners consider are: (1) whether the service provider has an established reputation for providing high quality, reliable service; (2) whether the service provider offers a full range of services, rather than a single type of service; (3) whether the service provider has sufficient financial and technical resources to meet its obligations, and intends to remain in the business for the long term.

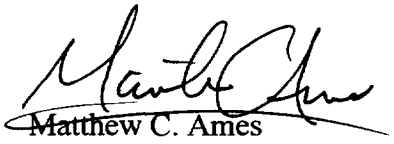
- Some providers have refused to serve certain Charles E. Smith buildings, even though Mr. Bitz wanted to introduce competitive providers in those buildings.

- Once a building owner has negotiated a few of them, license agreements with service providers are simple and are completed quickly, sometimes in as little as a month. The question is largely whether the service provider is prepared to meet the owner's concerns regarding insurance, indemnification, location of facilities in the building, and so on. With multiple providers in a building, the owner must have engineering plans from the provider and the owner's engineering staff and the provider must work together to ensure facilities are installed properly.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By 
Matthew C. Ames

cc: Jeffery Steinberg, Esq.
Zenji Nakazawa, Esq.
Eloise Gore, Esq.
Cheryl Kornegay, Esq.

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REGULATION OF BUILDING ACCESS IS UNNECESSARY AND THE COMMISSION HAS NO AUTHORITY TO ADOPT SUCH REGULATIONS

- **Regulation Is Unnecessary Because the Market Is Working.**

  - The CLECs themselves admit that they are rarely denied access, and have not identified building access as a material risk factor in their securities filings.
  - The CLEC industry has grown enormously in a short time without regulation of building access.
  - Real estate is a highly competitive market: owners grant access because they recognize value of providing tenants with telecommunications options. CLEC anecdotes are not evidence of market failure, but of the market working.
  - Based on the record before the Commission, it would be an abuse of the Commission's discretion to regulate access to buildings. *Home Box Office, Inc. v. FCC,* 567 F.2d 9 (D.C. Cir. 1977).
  - Why extend regulation to an unregulated sector of the economy?

- **The Commission Has No Jurisdiction or Authority Over Building Owners.**

  - The Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity or might have an incidental effect on a regulated activity. *See Regents v. Carroll,* 338 U.S. 586 (1950); *Radio Station WOW v. Johnson,* 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994); *Illinois Citizens Comm. for Broadcasting v. FCC,* 467 F.2d 1397 (7th Cir. 1972).
  - Building owners as such are not engaged in communications by wire or radio.
  - Even if the Commission has jurisdiction over wiring owned by building owners, it has no authority to act against building owners because no provision of the Act confers such authority. The Commission has acknowledged that building owners are not subject to its "regulatory scrutiny." *Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network,* CC Docket No. 81-216, *First Report and Order,* 97 FCC 2d 527 (1986) at ¶ 14.
  - The Commission's ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. *GTE Service Corp. v. FCC,* 474 F.2d 724, 735-36 (2d Cir. 1973); *Illinois Citizens Committee,* 467 F.2d at 1400.

- **The Commission Has No Authority To Impose Public Utility Style Regulation of Building Access, Even if such Regulation Were Justified.**

  - The Commission is not empowered to enforce the antitrust laws, except with relation to Title III licensees. *United States v. Radio Corp. of America,* 358 U.S. 334 (1959); Communications Act, §§ 313, 314.
  - The Federal Trade Commission has recognized that building owners are not monopolists. *Premerger Notification, Reporting and Waiting Period Requirements,* 61 Fed. Reg. 13666, 13674 (March 28, 1996). Building owners compete directly for tenants with other owners and must meet their needs to succeed.

- Tenants are not "locked in." Every year, approximately 20% of office tenants and over a third of apartment residents move.

- **Section 224 Does Not Apply to Facilities Located Inside Buildings.**

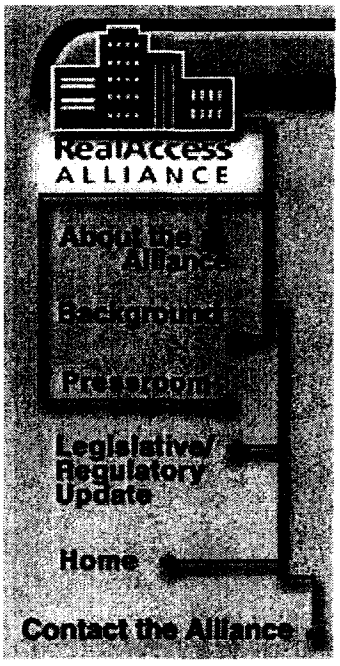
  - Section 224 was never intended to include access to buildings, and has never been interpreted to do so.
  - Building owners, and not utilities, own and control ducts and conduits inside their buildings.
  - Utility access rights inside buildings are not rights-of-way because they typically take the form of licenses and leases. Although easements may sometimes constitute rights-of-way, licenses and leases do not.
  - In any event, utility access rights are defined by state law, and the Commission cannot alter existing property rights.
  - Because of the enormous variety in the terms of access rights, the Commission cannot effectively use Section 224 to achieve its policy goal.

- **Any Attempt To Impose an Access Requirement Would Violate the Fifth Amendment.**

  - Any nondiscriminatory access requirement effects a *per se* physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Gulf Power Co. v. United States,* No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999).
  - The Commission cannot adopt a rule that effects a taking without express authority from Congress. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not given the Commission general authority to effect takings, nor has it authorized the Commission to establish a mechanism to compensate building owners for property occupied by CLECs.
  - The Commission cannot expand utility access rights under Section 224 without effecting a taking in a large number of cases.
  - Even the CLECs acknowledge that in certain cases a forced access requirement may constitute a regulatory taking, because owners have investment-backed expectations.

- **The Commission Cannot Extend the OTARD Rules to Common Areas and Nonvideo Services.**

  - The current OTARD rules are invalid because Section 207 was merely a directive to use existing authority to preempt certain governmental and quasi-governmental restrictions, and the Commission has no authority over building owners. For the same reason, the Commission cannot extend the rules to nonvideo services.
  - The Commission has correctly recognized that to extend the rules to common areas and restricted use areas would violate the Fifth Amendment.



Frequently Asked Questions

Some telecom companies have told Congress and the FCC that they need federal intervention because they're having difficulty gaining access to buildings. Is this true?

Not according to the experience of thousands upon thousands of buildings and tenants the Real Access Alliance represents across the country. In fact, an **independent survey** conducted by Charlton Research Company- which covered all geographic regions and building types across the country - found that nearly two-thirds (65%) of all requests fielded by building owners and managers from telecommunications companies within the last year regarding potential telecom services either led to approval for building access or to contract negotiations. This demonstrates that the market is working and that government intervention is unnecessary. In addition, there are many valid reasons why a solicitation may not result in access, such as contractual difficulties, lack of space or security concerns.

Claims of an access bottleneck are in stark contrast to the telecom companies' own statements. For example, on **July 8** and **August 10, 1999**, **Winstar Communications, Inc.** announced that it had obtained access rights to more than 700 commercial office buildings in the second quarter of 1999 - setting a new company record for the quarter - and had access rights to more than 5,500 buildings in key U.S. markets. Another major telecom provider, **Teligent Inc.,**, reported that at the end of the second/ww quarter of 1999, it had signed leases or options for 4,252 customer buildings. That represents a 37 percent increase from the total at the end of the first quarter. Because of this success, **Teligent Inc.** announced that it was raising its target for the number of buildings it expects to have under lease or option by the end of the year by 20 percent to 6,000. Many other companies have announced similarly impressive progress toward building out their networks.

Have there been instances where telecommunications providers have refused to provide service to buildings?

Unlike the Bell-type companies (known in the industry as Incumbent Local Exchange Carriers, or ILECs), who were required by law some years ago to provide "universal coverage," today new telecommunications companies (referred to as Competitive Local Exchange Carriers, or CLECs) can pick and choose which buildings they wish to serve. If you are fortunate to own an office building with affluent tenants in a major metropolitan area, acquiring service from a telecom provider is not a problem, since there is ample competition. However, cases have been reported where service has been denied due to a building's location and tenant mix. There is, in fact, evidence of telecom provider "cherrypicking" among city office buildings. Thirteen percent of those responding to the **Charlton survey** reported that they had been denied service by a telecommunications service provider. Some of the reasons given to building owners when service was denied included: the tenant "profile" of the building was unappealing; the building was in the "wrong" location; the provider refused to plug into the building's carrier neutral backbone; and the investment return was insufficient.

Are there instances where telecom companies have been denied access to buildings? If so, why?

Given the large number of competitive service providers and the finite leasable space in demand, owners and managers clearly cannot accommodate every solicitation they receive. In those cases where providers have been denied access, our survey data shows there are valid reasons. Chief among them is that the provider(s) refused to meet standard

contractual requirements agreed to by a great majority of other providers for building access. In other cases, the provider(s) had no credible business track record; there was no tenant demand for their services; the provider could not meet relevant building codes; or would not assume liability for the safety and security of the building infrastructure. Other providers insisted on exclusive access rights to the building - a request, that in some cases, would have undermined or limited tenant choices of telecom services.

What incentives are there for building owners to provide state-of-the-art telecommunications services to their tenants?

Tenants will, and do, vote with their feet by moving to another building if their telecom needs aren't being met by their present building owner. And they have an extraordinarily wide range of buildings to choose from. In the U.S. alone, there are about 1 million buildings with publicly leasable space (or 12.3 billion square feet).

In such a highly competitive market, the availability of advanced telecommunication services, ranging from high-quality voice and high-speed data to Internet access, is an increasingly important feature of private buildings. In fact, in the survey conducted by **Charlton Research**, 82% of building owners and managers responded that tenant demand/satisfaction and building marketability were the primary reasons for offering telecommunication services to their tenants.

Increasingly, building owners are investing millions of their own dollars to create "smart buildings," which serve as showcases for new telecommunications technologies and as magnets for high-tech tenants. For example, Rudin Management Company's building at **55 Broad Street** in New York City is considered to be one of the most technologically advanced building in the nation. The building, known as the New York Information Technology Center, provides its tenants with a wide range of technologies, such as high-speed Internet access, satellite communications, videoconferencing and a variety of telecommunications options. NYITC's tenants have access to six local telephone providers, seven long distance carriers and 11 Internet access providers. In today's real estate market, "wired buildings" are no longer a luxury - they're a necessity.

Do building owners charge telecom companies for access to their buildings?

Yes, just as they charge "rent" to other tenants who occupy or use valuable space within the building. The means of determining an appropriate rent varies among tenants. For some tenants, location, instead of mere square footage occupied, is the most relevant criteria for determining reasonable rent. For example, we all know that an 800 square foot penthouse suite with a view is a more desirable location than an 800 square foot basement apartment and, therefore, commands a higher rent. The lease process is similar for all persons who want to use or occupy valuable building space. For some tenants, such as retail tenants, a percentage of sales - or "contingent rent" - may be most appropriate. This rent takes into account the fact that a building offers not only a physical base of operations, but also aggregates tenants and attracts additional customers.

Under any scenario, it is unreasonable for telecom service providers to expect free access to a building and its pool of tenants. Owners risk millions of dollars in capital to construct buildings that aggregate the tenants who are most desirable to these telecom firms. Telecom providers, in turn, should recognize that space in a building and access to its tenants are a valuable commodity and that the price for renting that commodity necessarily varies with the location and use of the space.

How common are "exclusive" contracts between building owners and telecom service providers?

Exclusive contracts are uncommon. In most cases, building owners seek to offer the widest range of telecommunication options for their tenants through multiple providers. However, one out of every four **building owners who were surveyed by Charlton Research** said they had been approached by a competitive carrier requesting exclusive access.

In a limited number of circumstances, generally involving apartment buildings, exclusive contracts may be the only way to induce telecom companies to provide services to tenants. Having been rejected by an established telecom service provider for geographic or economic reasons, a building owners' only option may be to contract with a smaller, less established upstart telecom company. In these instances, an exclusive contract may be warranted to provide some assurance of a revenue stream (or the chance to create one) to cover the costs of their investment in connecting to a particular building. More often than not, however, exclusivity is rejected by building owners on the ground it will limit tenant choices.

Don't the Baby Bells have an unfair access advantage?

The Baby Bell-type telephone providers (ILECs) aren't subject to this type of "rent" because they entered buildings long ago under monopoly conditions and are obligated under federal law to serve all tenants. Attempting to compare the Baby Bells' unique status with that of newer telecom service providers - who are free to pick and choose among properties and tenants - is like trying to compare apples and oranges. Of course, as the Bell-type companies expand their range of products, such as broad band telecommunications, more and more building owners are seeking compensation arrangements comparable to those with newer telecom service providers.

Can the government take privately-owned property and let another person use it for their purposes?

No. Our founding fathers recognized the dangers of government intervention in private property. That's why the Fifth Amendment to the U.S. Constitution provides that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." Forced access is clearly a violation of the Fifth Amendment and, if implemented, would require just compensation to building owners whose property has been taken from them for the telecom providers. In essence, telecom providers want what amounts to a federal subsidy to expand their business - and they want to do it on the backs of building owners. Any FCC action giving telecom providers access at non-market rates would amount to a taking of property - a wireless land grab.

Are there state laws regarding forced access?

A substantial majority of states that have considered forced access proposals have rejected them. Of the 17 states that have considered forced access in the past three years, 14 have rejected forced access. Of the three that did not reject forced access outright, two are still under consideration and one allowed a telecommunications provider to enter property only with the agreement of the building owner. Three states implemented forced access provisions before the Telecommunications Act of 1996 was enacted: Connecticut, Texas and Ohio. The impact and constitutionality of such measures, however, have yet to be determined. In fact, there is anecdotal evidence to suggest that such measures have actually stifled competition. Since these statutes were enacted before the Telecom Act, they are not relevant guides for today's post-Telecom Act deregulatory environment.

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